INDUSTRIAL EQUITY LTD. & ANOR.

v.

DEPUTY COMMISSIONER OF TAXATION & ORS.

HIGH COURT AUSTRALIA
MASON CJ
BRENNAN J
DEANE J
DAWSON J
TOOHEY J
GAUDRON J
MC HUGH J
[MATTER NO. S30 & S31 OF 1990]
13 NOVEMBER 1990

ADMINISTRATIVE LAW: *Meaning of an exercise of a power for a purpose other than a purpose for which the power is conferred - Scope of review - Administrative Decisions (Judicial Review) Act 1977 (Cth), ss. 5(1)(d), (e), 2(1)(d), (g), 13.*

REVENUE LAW: *Powers of Commissioner under Act - Exercise of - Whether for purposes of Act - Right of access - Power to require production of documents - Party other than taxpayer - Meaning of 'random audit' - Process of selecting taxpayers for random audit - Income Tax Assessment Act 1936 (Cth) [AUST], ss. 6(1), 8, 17, 161(1), 166, 167, 169A, 170(1), (2), 263(1), 264(1)(b).*

These appeals arise from orders of the Full Court of the Federal Court. Each appeal arises from an application for an order of review made under the provision of the Administrative Decisions (Judicial Review) Act 1977.

By the first application Industrial Equity Limited (IEL) and Bankers Trust Australia Limited (BT) sought to have set aside decisions made on 13 April 1989 by the first respondent, the Deputy Commissioner of Taxation and the second respondent, an officer of the first respondent to issue to the third respondent, also an officer of the first respondent a document entitled "Authorisation for Access" directed to BT and associated companies. By the same application the appellants sought to set aside decisions by all respondents to seek access to the premises of BT and review of this conduct in seeking the access. The authorisation was purported to have been made under s. 263 of the Income Tax Assessment Act 1936 (Cth) (the 1936 Act).

By the second application, also under the same Act, IEL sought to have set aside "*ab initio*" the decision of the second respondent which required IEL to produce certain records at the Australian Taxation Office. The decision was purported to have been made under s. 264 of Income Tax Assessment the 1936 Act.

The first application was dismissed by Einfeld J in the Federal Court. Beumont J reserved the second application for the consideration of a Full Court of the Federal Court. Before the Full Court both the appeal from Einfeld J and the application reserved by Beumont J were dismissed.

There was evidence, unchallenged, that IEL had not been chosen for any particular reason and that to a large extent the process is quite random and that the Australian Tax Office had a policy of auditing the top one hundred companies.

The appellants contended that what the Commissioner was doing was carrying out a random audit which was an exercise not authorised by the Act and therefore any power exercised to that end could not be for a purpose of the Act.

Held (by majority):

[1] While the expression tax audit does not appear in the 1936 Act the words audit are defined as to "make an official systematic examination of (accounts)". Such an examination where a taxpayer's affairs are involved will be for the purpose of the 1936 Act.

[2] In this case the tax audit was a random audit in the sense that the Commissioner has singled out IEL as one of "the top one hundred companies" in Australia. IEL was not chosen for any particular reason other than that.

[3] The activities of a particular group of taxpayers might give rise to concern on the part of the Commissioner that their affairs call for an examination with a view to determining whether their returns of assessments truly reflect the taxable income of the taxpayers concerned or it may be that a particular group is capable of ready identification for audit purposes. It is likely that the number of such taxpayers is such that an enquiry into the affairs of all of them would be impracticable. As such the selection of some taxpayers for audit may be random but nevertheless be for the purposes of the 1936 Act.

[4] There was no contention on the part of the appellants that there had been an exercise of power in bad faith or an exercise of power so unreasonable that no reasonable person could have so exercised the power and since the challenged decisions were within the scope of and were made for the purposes of the 1936 Act the conclusion is inevitable that they did not constitute an improper exercise of power as made for a purpose other than a purpose for which the powers conferred by ss. 263 and 264 of the 1936 Act were conferred.

Per Gaudron J dissenting:

The random audit was a "roving enquiry" and there was no purpose other than that of ascertaining whether some revelation touching the taxpayers' income or liability will emerge and this does not constitute a purpose of the 1936 Act until some matters is thus revealed; therefore no purpose of the 1936 Act can be served. Hence the sole purpose of the decisions to exercise the right of access and the power to require the production of documents were decisions not made for a purpose of the 1936 Act.

[Appeals dismissed.]

Cases referred to:

Federal Commissioner of Taxation v. Australia & New Zealand Banking Group Ltd. [1979] 143 CLR 499 ***(cons)***
Commissioner of Taxation v. Dalco [1990] 168 CLR 614 ***(cit)***
Batagol v. Federal Commissioner of Taxation [1963] 109 CLR 243 ***(foll)***
O'Reilly v. State Bank of Victoria Commissioners [1983] 153 CLR 1 ***(cit)***
Commissioner of Taxation v. Citibank Ltd. [1989] 20 FCR 403 ***(cit)***
Southwestern Indemnities Ltd. v. Bank of New South Wales [1973] 129 CLR 512 ***(cit)***
Deputy Commissioner of Taxation v. Clarke & Kann [1984] 1 FCR 322 ***(cit)***
Swan Hill Corp. v. Bradbury [1937] 56 CLR 746 ***(cit)***
Shrimpton v. The Commonwealth [1945] 69 CLR 613 ***(cit)***
R. v. Bromhead; Ex parte Miss Daveney Pty. Ltd. [1946] 73 CLR 237 ***(cit)***
Samrein Pty. Ltd. v. Metropolitan Water Sewerage & Drainage Board [1982] 56 ALJR 678 ***(cit)***
Australian Broadcasting Tribunal v. Bond [1990] 64 ALJR 462 ***(cit)***
Brunetto v. Collector of Customs [1984] 4 FCR 92 ***(foll)***
Municipal Council of Sydney v. Campbell [1925] AC 338 ***(cit)***
Reg. v. Inland Revenue Commissioners; Ex parte Rossminster [1980] AC 952 ***(cit)***

Legislation referred to:
Administrative Decisions (Judicial Review) Act 1977 [Aust], ss. 5(1), (d), (e), (2)(c), (d), (g), 13
Income Tax Assessment Act 1936 [Aust], ss. 6(1), 8, 17, 161(1), 166, 167, 170(1), (2), 263(1), 264(1)(b)
Taxation Laws Amendment Act 1986 [Aust], ss. 25(1), 169A, 170

Other sources referred to:
Jowitt's Dictionary of English Law, 2nd Edn. (1977), p. 1283
Tax Audits: An A.T.O. Perspective (1990) 24 *Taxation in Australia* 741
The Shorter Oxford English Dictionary

For the appellants in both matters - Rosenblum & Partners
For the respondents in both matters - Australian Government Solicitor

JUDGMENT

Mason CJ, Brennan, Deane, Dawson, Toohey, McHugh JJ:

These appeals from orders of the Full Court of the Federal Court raise questions as to the power of the Commissioner of Taxation to conduct what were referred to in argument as random audits. As there is an element of question begging in the term "random", it is necessary to state with some precision just what the Court is called upon to determine.

Each appeal arises from an application for an order of review made under the provisions of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act). By the first application, Industrial Equity Limited (IEL) and Bankers Trust Australia Limited (Bankers Trust) sought to have set aside decisions made on or about 13 April 1989 by the first respondent, the Deputy Commissioner of Taxation, and the second respondent, Ronald James Crawley, who is an officer of the first respondent, to issue to the third respondent, Peter Thomas Carroll, also an officer of the first respondent, a document entitled "Authorization for Access" directed to Bankers Trust and associated companies. By the same application, those appellants also sought to have set aside decisions by all respondents to seek access to the premises of Bankers Trusts and review of their conduct in seeking that access. The authorization purported to have been made pursuant to s. 263 of the Income Tax Assessment Act 1936 (Cth) (the Act). Section 263(1) of that Act reads:

> The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.

By the other application, also made under the provisions of the ADJR Act, IEL sought to have set aside, in this case "*ab initio*" decisions of Mr. Crawley or of the Deputy Commissioner to require IEL to produce certain records at the Australian Taxation Office. That decision purported to have been made pursuant to s. 264 of the Act. Section 264(1) reads:

> The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a government or by any public attorney:
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> (a) to furnish him with such information as he may require; and
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> (b) to attend and give evidence before him or before any officer authorised by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.

The first application was dismissed by Einfeld J in the Federal Court. Beaumont J reserved the second application for the consideration of a Full Court of the Federal Court. Before the Full Court, both the appeal from Einfeld J and the application reserved by Beaumont J were dismissed.

It is necessary now to say something of the circumstances giving rise to these appeals. On 13 April 1989 Mr. Crawley authorised Mr. Carroll to enter all premises owned or occupied by Bankers Trust and its associated companies and all premises at which records of Bankers Trust and those companies were held, relating to transactions conducted with, for or on behalf of IEL and associated entities for the financial years ended 30 June 1984 to 30 June 1988, "for any of the purposes of the Income Tax Assessment Act 1936". The document authorized Mr. Carroll, "for any such purpose", to make extracts from any such records. In a statement dated 10 May 1989 furnished to Bankers Trust pursuant to s. 13 of the ADJR Act in relation to that decision, Mr. Crawley said that the Commissioner of Taxation "was and is conducting an audit" into the taxation affairs of IEL and associated entities for the period 1 July 1984 to 30 June 1988; that IEL was a client of Bankers Trust during the period; that Mr. Crawley believed Bankers Trust held records relevant to the affairs of IEL during the period in question; that Mr. Crawley believed gaining access to those papers would assist in the taxation audit; and that:

> It is most important that the Commissioner be in possession of all the material facts and information necessary to determine the taxation liability of Industrial Equity Limited and associated entities.

There was evidence, unchallenged, that Mr. Crawley had told IEL that it had "not been chosen for any particular reason", "to a large extent the process is quite random", and the Australian Taxation Office had "a policy of auditing the top one hundred companies and there really isn't any other reason."

On 23 August 1989, while judgment on the first application was reserved, the Deputy Commissioner issued a notice pursuant to s. 264 of the Act, requiring the proper officer of IEL to attend the Australian Taxation Office at a named address on a specified date and to produce books, documents and other papers, identified by category, relating to the income or assessments of IEL and the income or assessments of any of the companies shown in the "group of companies" list in the "Notes to the accounts" in the 1985, 1986, 1987 and 1988 annual reports of IEL. Those documents were identified in these terms:

> (a) Documents described in your letter of 6 December 1988 as project files in relation to real property purchased or developed as part of a joint venture or otherwise; and
>
> (b) Property and development registers.

Another notice in much the same terms was issued by the Deputy Commissioner, also on 23 August 1989, again addressed to the public officer of IEL. One notice required production of all books, documents and other papers from the period 1 July 1984 to 30 June 1988; the other notice specified 1 July 1987 to 30 June 1988.

A statement furnished by Mr. Crawley pursuant to s. 13 of the ADJR Act in relation to the decision to require the production of documents for the period 1 July 1984 to 30 June 1988 repeated the statement that the Commissioner "has for some time been and is conducting an audit" into the taxation affairs of IEL and associated entities for the period in question and said that the papers " are or may be relevant to the said audit".

The scope and operation of ss. 263 and 264 have been considered in a number of decisions of this Court and of the Federal Court, notably in *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd.* [1979] 143 CLR 499 (*Smorgon's* case). Before turning to any of these decisions, it is desirable to state briefly the wider statutory context in which the two sections appear.

Section 8 of the Act charges the Commissioner with "the general administration of this Act". Section 17 levies income tax "upon the taxable income derived during the year of income by any person." "Taxable income" is defined by s. 6(1) to mean generally "the amount remaining after deducting from the assessable income all allowable deductions". By the same section, "assessable income" means "all the amounts which under the provisions of this Act are included in the assessable income" and "allowable deduction" means "a deduction allowable under this Act". At times relevant to these appeals, a person was required to furnish to the Commissioner a return "setting forth a full and complete statement of the total income ... derived by him during the year of income, and of any deductions ... claimed by him": s. 161(1). Section 166 provides:

> From the returns, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon.

Section 167 authorizes a default assessment in the circumstances there mentioned, which include "(b) the Commissioner is not satisfied with the return furnished by any person": see generally *Commissioner of Taxation v. Dalco* [1990] 168 CLR 614.

While not using the term "self-assessment", the Taxation Laws Amendment Act 1986 (Cth) effected changes to the Act which were designed to encourage honest self-assessment, while at the same time widening the powers of the Commissioner to amend assessments. In his second reading speech the Acting Treasurer said:

> Under self-assessment the Commissioner's officers will generally not subject income tax returns to the same degree of technical scrutiny that has existed in the past before a notice of assessment is issued. Self-assessment will mean that, after assessments have been issued, there will be more audits and more checking and verifying of information in returns against data obtained from external sources.
>
> The more limited initial checking of returns that will occur under self-assessment could mean that the assessment that is made on the basis of a taxpayer's return produces a tax bill that is higher or lower than what the law really authorises. To remedy this, the Commissioner's power to amend assessments is to be widened": *House of Representatives, Parliamentary Debates (Hansard)*, 17 April 1986, p. 2555.

One change made by the amending legislation was the introduction of s. 169A which applies to assessments (not being amended assessments) made on or after 1 July 1986 in respect of income of the year of income that commenced on 1 July 1985 or of any subsequent year of income, and to the first and any subsequent amendment of such an assessment: Taxation Laws Amendment Act, s. 25(1).

Section 169A(1) reads:

> Where a return of income of a taxpayer of a year of income is furnished to the Commissioner (whether or not by the taxpayer), the Commissioner may, for the purposes of making an assessment in relation to the taxpayer under this Act, accept, either in whole or in part, a statement in the return of the assessable income derived by the taxpayer and of any allowable deductions or rebates to which it is claimed that the taxpayer is entitled and any other statement in the return relevant to the assessment.

Consequential changes were made to s. 170 which authorizes the Commissioner to amend assessments. These changes took effect with respect to the same year of income and the same assessment date as s. 169A. Section 170(1), which remains unchanged, empowers the Commissioner, "subject to this section", to amend an assessment at any time "by making such alterations therein or additions thereto as he thinks necessary" and to do so "notwithstanding that tax may have been paid in respect of the assessment". Section 170(2) empowered the Commissioner, where "a taxpayer has not made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment", to correct "the assessment". Hitherto, the power had been to correct "an error in calculation or a mistake of fact or to prevent avoidance of tax as the case may be." True, s. 170 contains various limitations of time in regard to the amendment of assessments but there can be no doubt that the section, as amended in 1986, reflects an extension of the Commissioner's power in this regard. It is significant that the power to amend assessments conferred by s. 170 is not conditional upon belief or suspicion on the part of the Commissioner.

From the sections that have been mentioned and from other sections of the Act, including those relating to the process of assessment, it is apparent that, before the Commissioner makes or amends an assessment, he may need information from a variety of sources relating to activities of a taxpayer that may bear upon the liability for income tax of that taxpayer. The Act imparts powers to the Commissioner, designed to assist him in obtaining that information.

In the course of its judgment in the instant case the Full Court of the Federal Court said:

> Even before the introduction in the Act of s. 169A by the Taxation Laws Amendment Act 1986, the process of assessment did not end with the issue of the original notice of assessment. It was an ongoing activity entitling, and at times requiring, the Commissioner from time to time to call for and to examine information in his possession, to verify its accuracy, to call in aid his inquisitorial and compulsory powers under sections such as ss. 263 and 264, to review his earlier assessments and to decide whether to issue amended assessments.

The expression "ongoing activity" is susceptible of misunderstanding. If it is meant to suggest that before 1986 the raising of an assessment against a taxpayer was a tentative act, carrying no finite consequences, the expression cannot be supported. In *Batagol v. Federal Commissioner of Taxation* [1963] 109 CLR 243, at p. 252. Kitto J referred to the definition of "assessment" in the Act as meaning "the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case." Indeed, the Federal Court had earlier referred to that passage in its judgment. As a description of the process involved, the statement holds good even today. It is inherent in the process contemplated by s. 169A that the checking of taxpayers' returns is more likely to take place after assessments have been raised. If the Full Court meant no more than that the Commissioner is not precluded, by reason of on assessment, from making further enquiries into the affairs of a taxpayer, there can be no quarrel with what was said.

The breadth of the Commissioner's powers in this regard was stressed by Mason J in *Smorgon's* case when his Honour said, at p. 536:

> The strong reasons which inhibit the use of curial processes for the purposes of a 'fishing expedition' have no application to the administrative process of assessing a taxpayer to income tax. It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging inquiries, and to make them long before any

> issue of fact arises between him and the taxpayer. Such an issue will in general, if not always, only arise after the process of assessment has been completed. It is to the process of investigation before assessment that s. 264 is principally, if not exclusively, directed.

See also Gibbs ACJ, at p. 524, Jacobs J, at p. 542, and Murphy J, at pp. 545-546.

It is true that in the instant case the Commissioner had, before the exercise of power under ss. 263 and 264, already issued original assessments or amended assessments to IEL and to its associated companies in connection with some of the years of income to which that exercise of power was directed. The existence of an assessment, even of an amended assessment, cannot of itself deny to the Commissioner the powers contained in ss. 263 and 264 of the Act. It may, particularly where an amended assessment already exists, place an exercise of power under either of the sections in more stark relief than would ordinarily be the case. But the principle involved remains the same; it is that the actions of the Commissioner must be taken for the purposes of the Act.

The words "for any of the purpose of this Act" have been embedded in s. 263(1) and its predecessors since 1918: their legislative history is traced in *O'Reilly v. State Bank of Victoria Commissioners* [1983] 153 CLR 1, at pp. 43-44, and in *Commissioner of Taxation v. Citibank Ltd.* [1989] 20 FCR 403, at pp. 428-429. No such expression appears in s. 264; purpose is referred to only obliquely in the words "concerning his or any other person's income or assessment" in s. 264(1)(b). It may be, as the Commissioner submits, that any more specific reference to purpose was unnecessary. Be that as it may, it is clear enough that the powers contained in s. 264(1), like those contained in s. 263, must be exercised for the purposes of the Act. The question whether a purpose is a purpose of the Act should be considered in the context of s. 17 of the Act. This section provides for the levy of tax upon the taxable income of a person derived during a year of income and it is by reference to this primary purpose that all other purposes of the Act are to be determined. Section 8 charges the Commissioner with the general administration of the Act which includes the due making of assessments to tax (s. 169) and the recovery of tax payable by taxpayers pursuant to the Act (Pt. VI, Div. 1). Sections 263 and 264(1) each confer on the Commissioner a power to enable him to perform his functions under the Act. Therefore, the power "must be circumscribed by reference to this purpose": *Smorgon's* case, at p. 535. The scope of "purpose" in this context is illustrated by *Southwestern Indemnities Ltd. v. Bank of New South Wales* [1973] 129 CLR 512, where Barwick CJ said, at p. 519:

> In my opinion, an examination of the applicant's affairs to test its assertions as to residence and income source is within the purposes of the Act.

Although each application for an order of review contained a number of grounds, by the time the matter reached the Full Court each was confined effectively to the question whether the relevant exercise of power was for the purposes of the Act. And so the matter was argued before this Court. The appellants fastened on to the argument that what the Commissioner was engaged in doing was carrying out a random audit, an exercise which, it was said, the Act did not authorize, and therefore that any power exercised to that end could not be for a purpose of the Act.

The expression "tax audit" does not appear in the Act. The *Shorter Oxford English Dictionary* defines "audit" as "make an official systematic examination of (accounts)". Such an examination, where a taxpayer's affairs are involved, will be for the purposes of the Act where it is directed to ascertaining the taxable income of a taxpayer. The examination is relevant to the process of assessment and to the further consideration of an assessment,

once raised. In truth, it is the so-called random nature of the audit of which the appellants complain. The term "random" calls for some care in the present context. The exercise of power is random in the sense that the Commissioner has singled out IEL as one of the "top one hundred companies" in Australia. To borrow the words attributed to Mr. Crawley, IEL was not chosen for any particular reason other than that it was one of the top 100 companies, which the Australian Taxation Office has a policy of auditing.

Clearly enough, the resources of the Australian Taxation Office do not extend to auditing the returns of every taxpayer, even if it were thought appropriate to do so: see Nicholls, "*Tax Audits: An A.T.O. Perspective*", (1990) 24 Taxation in Australia 741, where the emphasis on tax audits, since the introduction of self-assessment, is discussed. It is entirely consistent with the Act that the Commissioner should, at one time, decide to look more closely into the affairs of particular categories of taxpayers as well as of particular taxpayers, with a view to ascertaining their taxable income, and this whether an assessment or an amended assessment has issued. It may be the top 100 companies this time, primary producers another time, and property developers yet another time. IEL did not argue that the selection of the top 100 companies as a category for inquiry was necessarily improper; rather, the complaint was of the selection of IEL merely because it fell within that category. Inevitably, there will be a random aspect to those who are finally selected for closer examination; but the Commissioner will still be acting for the purposes of the Act so long as he is endeavouring to fulfil his function of ascertaining the taxable income of taxpayers.

In that regard it is important to note the distinction between the reason for performing an act and the purpose sought to be achieved by the doing of the act. Here, as the exercise of the powers conferred by ss. 263 and 264(1) occurred in the course of the tax audit of IEL, the relevant enquiry is whether any of the purposes of the tax audit can also be said to be purposes of the Act. The reason for the taxation audit of IEL was said to be IEL's membership of the group of top 100 companies, the Commissioner having a policy to conduct audits of companies falling within that category. However, the purposes of the audit of IEL are certainly not limited to the implementation of that policy.

Moreover, as the reason given for the selection of IEL did not alter the nature of the audit conducted, the purposes of the Commissioner's decision to audit IEL may also be determined from the purposes inherent in the nature of a taxation audit, the most immediate being the ascertainment of the taxable income of the taxpayer. It must also be stressed that the powers exercisable under ss. 263 and 264 do not require that the person in occupation of a building in which records are kept or that the person called upon to furnish information be the taxpayer or a member of the category of taxpayers into whose affairs the Commissioner is enquiring. The ascertainment of taxable income may require the Commissioner to look to persons, other than the relevant taxpayer, for information bearing upon the taxable income of that taxpayer.

It is true that the Commissioner offered no reason as to why the category of the top 100 companies had been chosen. It is not hard to imagine that the activities of a particular group of taxpayers might give rise to concern on the part of the Commissioner that their affairs call for examination with a view to determining whether their returns or assessments truly reflect the taxable income of the taxpayers concerned. It may appear, for instance, that they are engaged in an unusual form of commercial transaction apparently designed to avoid the production of assessable income or that a type of deduction claimed by taxpayers in the particular group seems unduly high when compared with a similar deduction claimed by other taxpayers. On the other hand, it may be no more than that a particular group is capable of ready identification for audit purposes. In either event it is likely that the number of taxpayers

in the group in question is such that an inquiry into the affairs of all of them is impracticable. In those circumstances, the selection of some taxpayers for "audit" may be random but nevertheless be for the purposes of the Act. The Commissioner was conducting an "audit" into the affairs of IEL and its associated companies for a recent period of four years. Bankers Trust was believed to hold papers relevant to the affairs of IEL during the period. The reason stated by the Commissioner on 10 May 1989 for having authorized access to the premises of Bankers Trust was the need "to determine the taxation liability of Industrial Equity Limited and associated entities". The reason was not as forthcoming as one would expect the Commissioner to provide; nevertheless it pointed to action taken for the purposes of the Act. It was not inconsistent with what had been said by Mr. Crawley. The same may be said of the notices under s. 264; the documents required were identified with some specificity. If there was a "fishing expedition", it was in the sense spoken of by Mason J in *Smorgon's* case, at p. 536, that is, a wide-ranging inquiry to ascertain a taxpayer's taxable income. Such an inquiry is clearly for the purposes of the Act and, since the introduction of s. 169A, the process of investigation contemplated by ss. 263 and 264 is more likely to arise after assessment than before. The period being investigated by the Commissioner, that is, 1 July 1984 to 30 June 1988, included one year to which the 1986 amendments to the Act were not relevant.

However, it was not suggested by the parties that the result of the appeal should in any way turn on that distinction.

Review of the respondents' decisions is sought within the ADJR Act. It was not disputed that a decision to invoke a power conferred by either s. 263 or s. 264 of the Act is a decision made under an enactment, hence a decision to which the ADJR Act applies. The respondents did not contend that any of the decisions challenged fell within para. (e) of Schedule 1 to the ADJR Act: see *Deputy Commissioner of Taxation v. Clarke and Kann* [1984] 1 FCR 322. Any such decision is susceptible of review on one or more of the grounds in s. 5(1) of that Act. In particular, a decision to invoke a power conferred by s. 263 or s. 264 may be reviewed if the decision was "not authorized by the enactment in pursuance of which it was purported to be made" (s. 5(1)(d) of the ADJR Act) or was "an improper exercise" of the power so conferred: see s. 5(1)(e), as amplified in s. 5(2)(c) which construes an improper exercise of power to include an exercise of power for a purpose other than a purpose for which the power is conferred. The appellants did not contend that there had been an exercise of power in bad faith (s. 5(2)(d)) or an exercise of power so unreasonable that no reasonable person could have so exercised the power: s. 5(2)(g).

Once the view is reached that the challenged decisions were within the scope of and were made for the purposes of the Act, the conclusion is inevitable that they did not constitute an improper exercise of power as made for a purpose other than a purpose for which the powers conferred by ss. 263 and 264 were conferred: s. 5(1)(e) read with s. 5(2)(c). Nor can it be said that they were not authorised by the Act. Likewise, the conduct sought to be reviewed by the first application is not susceptible of challenge.

We would dismiss the appeals.

Gaudron J:

These two appeals are brought from orders of the Full Court of the Federal Court of Australia made in separate matters which, by consent, were heard together, one being an appeal from a decision of Einfeld J and the other being an application for an order of judicial review heard and determined by the Full Court in the exercise of original jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act).

The question raised by the appeals is whether a decision made by the Deputy Commissioner of Taxation (the Deputy Commissioner) or other persons authorized in that behalf to exercise the right of access conferred by s. 263(1) of the Income Tax Assessment Act 1936 (Cth) (the Act) and a similar decision to exercise the power to require production of documents conferred by s. 264(1)(b) of that Act are decisions which are not authorized by, or, alternatively, constitute an improper exercise of, the powers conferred by the Act. See s. 5(1)(d) and (e) of the ADJR Act.

The decision to exercise the right of access is the subject of the first appeal. That decision was the subject of the appeal from Einfeld J his Honour having dismissed an application for an order of judicial review. The appeal was also dismissed. The second appeal concerns the decision to exercise the power to require the production of documents. That decision was the subject of the application for an order of judicial review heard and determined by the Full Court in the exercise of original jurisdiction. That application was also dismissed. In this Court the appellants, the unsuccessful applicants for judicial review in the Federal Court, seek, if their appeals are successful, to have the decisions made by the Deputy Commissioner or other persons authorized in that behalf set aside. They seek additional relief by way of injunction.

Section 263(1) of the Act confers a right of access in these terms:

> The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.

Section 264(1) of the Act relevantly provides:

> The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a government or by any public authority:
>
> (b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.

The right of access conferred by s. 263(1) of the Act is expressly limited by the requirement that it be exercised for a purpose of the Act. The power conferred by s. 264(1)(b) is similarly confined for a statutory power may not be exercised for a purpose extraneous to the statute by which it is conferred. See *Swan Hill Corporation v. Bradbury* [1937] 56 CLR 746, at pp. 757-758; *Shrimpton v. The Commonwealth* [1945] 69 CLR 613, at p. 620; *R. v. Bromhead; Ex parte Miss Daveney Pty. Ltd.* [1946] 73 CLR 237, at p. 243; *Samrein Pty. Ltd. v. Metropolitan Water Sewerage and Drainage Board* [1982] 56 ALJR 678, at p. 679; 41 ALR 467, at p. 468. See also *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd.* [1979] 143 CLR 499, per Mason J at p. 535, where it was said that as the power conferred by s. 264(1)(a) of the Act is "given to the Commissioner for the purpose of enabling him to perform his functions under the Act it must be circumscribed by reference to this purpose".

The argument made on behalf of the appellants that the decisions were not authorized by, or, alternatively, constitute an improper exercise of, the powers conferred by the Act is based on the proposition that the decisions were not made for a purpose of the Act. The argument requires a consideration of the circumstances in which the decisions were made and of the separate reasons for those decisions provided pursuant to s. 13 of the ADJR Act.

The decisions to exercise the right of access and to require the production of documents were taken in the course of a taxation audit of the affairs of Industrial Equity Limited (IEL), the first appellant in the first appeal and the appellant in the second appeal, and its associated entities. Initially the audit was to cover the financial years ending June 1985, 1986 and 1987. It seems from the reasons given for the decisions pursuant to s. 13 of the ADJR Act that it was later extended to include the financial year ending June 1988.

The decision to audit the affairs of IEL and its associated entities was communicated to IEL in July 1988 and the audit commenced soon afterwards. The decision to undertake the audit was not prompted by any specific matter bearing upon the tax liability of IEL or any of its associated entities. The undisputed evidence is that Mr. Crawley, the second respondent to the first appeal and the first respondent to the second appeal, informed IEL that it had "not been chosen for any particular reason" and that "(t)o a large extent the process is quite random". That statement was elaborated by the further statement that (t)he tax office ... has a policy of auditing the top one hundred companies and there really isn't any other reason."

The communicated reason for the audit is, to some extent, borne out by the fact that there appears to have been no controversy between the Deputy Commissioner and IEL or any of its associated entities as to the filing of returns or as to the assessable income or tax payable for any of the financial years ending June 1985, 1986 and 1987, save, perhaps, with respect to an amended assessment of the tax payable by IEL for the financial year ending June 1987. The amended assessment can be put to one side, for it played no part in the reasons for the decisions to exercise the right of access and to require the production of documents. Indeed, IEL was expressly informed that the decision to exercise the right of access was not related to the amended assessment.

One other matter may be noted for the purpose of being put aside. For each of the years ending June 1985, 1986 and 1987, IEL and an associated company, IEL Finance Limited, had received either assessment notices or "Nil Tax Payable" notes. The matter was argued in this Court on the basis that a "Nil Tax Payable" note constitutes an assessment as defined by s. 6(1) of the Act. Consequently, it was put, the only purposes of the Act upon which the respondents might rely to justify the decisions as they affected IEL and IEL Finance Limited for those particular years were those of determining whether to amend the assessments and the amending of them pursuant to s. 170 of the Act. In the view that I have formed the question whether a "Nil Tax Payable" note is an assessment need not be explored. However, it may noted that, in *Batagol v. Federal Commissioner of Taxation* [1963] 109 CLR 243, Kitto J (at p. 252) considered that an assessment involves that step by which "a specified amount of money will become due and payable as the proper tax in that case". See also per Owen J at p. 256.

The audit proceeded for some months. Then, in mid-April 1989, the decision was taken to exercise the right of access by entering the premises of Bankers Trust Australia Limited, the second appellant in the first appeal, and there inspecting books, documents and other papers relating to the affairs of IEL and its associated entities. A request was made pursuant to s. 13 of the ADJR Act for the reasons for this decision. Reasons were provided. Findings on material questions of fact were recorded as follows:

(a) The Commissioner of Taxation was and is conducting an audit into the affairs of Industrial Equity Limited and associated entities for the period 1 July 1984 to 30 June 1988.

(b) Industrial Equity Limited was a client of Bankers Trust Australia Limited during the period in question.

(c) I believe and believed that Bankers Trust Australia Limited, Tower Building Australia Square, holds books, documents and other papers relevant to the affairs of Industrial Equity Limited during the period in question.

(d) I believe that gaining access to the books documents and papers held by Bankers Trust Australia Limited in relation to Industrial Equity Limited will assist in the taxation audit.

(e) It is most important that the Commissioner be in possession of all the material facts and information necessary to determine the taxation liability of Industrial Equity Limited and associated entities.

The reason given for the decision was:

> Gaining access to any books, documents and papers held by Bankers Trust Australia Limited in relation to Industrial Equity Limited for the period in question may assist in the taxation audit.

Later, in August 1989, the decision was made to exercise the power to require the production of documents and a notice setting out the documents which were required to be produced was served on the public officer of IEL. Again, reasons for this decision were sought and provided pursuant to s. 13 of the ADJR Act. Findings on material questions of fact were recorded as follows:

(a) The Commissioner of Taxation has for some time been and is conducting an audit of the taxation affairs of IEL and associated entities for the period 1 July 1984 to 30 June 1988.

(b) The books, documents and other papers required to be produced, in my opinion, are or may be relevant to the said audit.

(c) I am duly authorised to exercise, in the name of and on behalf of the Deputy Commissioner of Taxation, the powers conferred by s. 264 of the Income Tax Assessment Act 1936, those powers having been delegated to the Deputy Commissioner of Taxation by the Commissioner of Taxation.

The reason for the decision was:

> In the course of and for the purposes of conducting the said audit I wish to examine the books, documents and other papers required to be produced concerning IEL and associated entities.

The reasons given for the decision pursuant to s. 13 of the ADJR Act identify the decisions with the audit. Thus, as has been accepted by all parties at all stages of these proceedings, the purpose attending the audit is the purpose, and the only purpose, attending the decisions. However, as the Act makes no provision with respect to audits and as no reason, other than its membership of the class described as "the top one hundred companies", was given for auditing the affairs of IEL and its associated entities, the purpose attending the decisions must be discerned either from the nature of a taxation audit or from the policy decision to audit the affairs of "the top one hundred companies".

In this Court it was put on behalf of the respondents that, in the absence of evidence of frivolity, malice, oppression or like matters, the purpose of a taxation audit must be taken to be that which appears from its nature. So much may be accepted. That purpose was said to be:

> ...to find out what the taxable income of a taxpayer is; to decide ... whether or not to make an assessment, where there has been no previous assessment; to calculate the amount of the assessment and, an assessment has, in fact, been made ... (to decide) whether the assessment should be amended.

There can be no doubt that determining whether or not to make an assessment, the making or the calculation of the amount of the assessment, determining whether an assessment should be amended and, also, the amendment of an assessment are purposes of the Act. Nor is there any doubt that ascertaining the assessable income of a taxpayer is a purpose of the Act, at least if undertaken for the purpose of determining whether an assessment should be made or amended or for the purpose of making or amending an assessment. Those purposes are not an exhaustive statement of the purposes of the Act, for, clearly enough, the purposes extend to the identification of those who have received assessable income. However, those purposes are the only purposes which have been suggested as bearing upon the decisions the subject of these appeals. If the decisions were made for any one or any combination of those purposes they were made for a purpose of the Act.

Were the evidence simply to the effect that a decision was made to audit the affairs of IEL and its associated entities, then, in the absence of evidence of some other purpose, it might safely be assumed by reason of the nature of a taxation audit that the decision was made for the purpose of determining whether assessments should be made or amended and, if so, the making or amending of those assessments. And, were the evidence as thus described, that assumption might be supported by other material including material such as the statement in the findings on material questions of fact that it was most important that the Commissioner ascertain all "material facts and information necessary to determine the taxation liability" of IEL and its associated entities. However, the evidence is that the decision was made by reason of IEL's membership of the class of "the top one hundred companies". If any one or any combination of the purposes of determining whether an assessment should be made or amended or of making or amending an assessment is to be ascribed to the decision to audit the affairs of IEL and its associated entities, it must be because it attended the policy decision to audit "the top one hundred companies", for "there really (wasn't) any other reasons" for the selection of IEL and its associated entities. Thus it is necessary to ask whether the policy decision to audit "the top one hundred companies" is one which, of its nature, discloses a purpose which is a purpose of the Act.

What may properly be ascribed to an isolated event is not necessarily - perhaps, is rarely - that which is properly to be inferred when the event is or is to be repeated with some frequency. Repetition or intended repetition suggests a purpose or purposes which may be deduced from the event and the circumstances in which it was, or was intended to be, repeated. It is known that the audit of IEL was, or was to be, replicated with respect to "the top one hundred companies". Nothing is known of those companies save that the respondents have not, at least in these proceedings, pointed to any matter relating to the taxation affairs of any of them other than IEL. And, of course, save for IEL and its associated entities, no evidence was led as to the taxation affairs of any of them. The failure to point to some such matter or to adduce some such evidence makes it impossible to accept, as a rational hypothesis, that the policy decision with respect to "the top one hundred companies" was a decision to investigate each of those companies and, presumably, each of their associated companies for the purpose of determining whether, in respect of each of those companies, assessments should be made or amended for the years covered by the audit and, if so, the making or amending of those assessment. Such a purpose could be ascribed only if there were grounds for thinking that the Commissioner suspected (even if unreasonably) that "the top one hundred companies", or a reasonably significant number of them, might have been derelict in making returns or in disclosing the matters necessary for the correct assessment of their tax liability. But the respondents neither assert such suspicion nor point to matters upon which such a suspicion might be based. Accordingly, the only hypothesis

that is reasonably open is that the decision to audit " the top one hundred companies" was in the nature of a "fishing expedition" or a "roving enquiry" undertaken with a view to acting upon any matter which might be revealed, including by the making or amendment of assessments, should the ascertainment of the taxable income of a taxpayer warrant and, in the case of amended assessments, if the relevant conditions of s. 170 of the Act should be satisfied.

The power conferred by s. 264(1) of the Act is not limited by an implied requirement that it be exercised to ascertain some particular matter: *Australia and New Zealand Banking Group Ltd.* In that case Gibbs ACJ observed (at p. 524):

> The apparent intention of the parliament is that the Commissioner is entitled to have produced any books and documents that relate to the taxpayer's income or assessment, even if he does not know what those books and documents may reveal. In other words the Commissioner is entitled to make what was described as a "roving enquiry" into the income or assessment of a particular taxpayer and for that purpose to have produced such documents as relate to that income or assessments.

See also per Mason J at p. 536, per Jacobs J at p. 542, and per Murphy J at p. 546. The same is necessarily true of the right of access conferred by s. 263(1) of the Act for "the sole limitation or qualification (on that right) is that the access should be sought for 'the purposes of the Act'": *Southwestern Indemnities Ltd. v. Bank of New South Wales* [1973] 129 CLR 512, per Barwick CJ at p. 520.

However, as is clear from *Southwestern Indemnities* and notwithstanding that the right and the power conferred respectively by s. 263(1) and s. 264(1)(b) of the Act may be utilised to conduct a "roving enquiry", their exercise must be attended with a purpose that is a purpose of the Act.

There is a difference between, on the one hand, a "roving enquiry" undertaken for the purpose of determining whether an assessment should be made or amended and, if so, the making or amending of that assessment, and, on the other hand, a "roving enquiry" undertaken with a view to doing one or more of those things should some matter be revealed in the course of the enquiry. In the former situation the enquiry is at all stages attended with a purpose of the Act. In the latter, some such purpose may be formed during the course of the enquiry but, unless and until it is formed, there is no purpose other than that of ascertaining whether some revelation touching the taxpayer's income or liability will emerge. That does not of itself constitute a purpose of the Act for until some matter is thus revealed no purpose of the Act can be served. As no other purpose can reasonably be ascribed to the policy decision to audit "the top one hundred companies" and as the policy decision ultimately identifies the sole purpose of the audit undertaken with respect to IEL and its associated entities, hence, the sole purpose of the decisions to exercise the right of access and the power to require the production of documents, those last decisions must be held not to have been made for a purpose of the Act.

> Section 5(1) of the ADJR Act allows for review of a decision on the grounds, amongst others:
>
> (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
>
> (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made.

By s. 5(2)(c) of that Act, the reference in s. 5(1)(e) to an improper exercise of a power is to be construed as including "an exercise of a power for a purpose other than a purpose for which the power is conferred".

The expression "not authorized by the enactment" in s. 5(1)(d) of the ADJR Act refers to a decision which is expressly or impliedly forbidden. See *Australian Broadcasting Tribunal v. Bond* [1990] 64 ALJR 462, at p. 487; 94 ALR 11, at p. 54. It may be that s. 5(1)(d), construed in the context of s. 5(1)(e) and (2)(c), refers to the subject matter of a decision rather than to the purpose for which it is made. On the other hand, it may simply be that there is some overlap of the areas covered by the grounds set out in paras. (d) and (e) of s. 5(1), each ground covering decisions made for a purpose other than a purpose of the enactment under which it purportedly was made. The precise relationship between ss. 5(1)(d) and 5(1)(e) when construed by reference to s. 5(2)(c) need not be explored, for a decision which is made" for a purpose other than a purpose for which the power is conferred" is clearly reviewable under s. 5(1)(e) of the ADJR Act.

It was put on behalf of the respondents that the onus of establishing that a decision was made for an improper purpose lies on an applicant for judicial review and that in the present cases that onus had not be discharged. In particular, it was put that, in determining whether the onus had been discharged, a Court should proceed by application of the presumption, embodied in the Latin expression *omnia praesumuntur rite et solemniter esse acta*, that all things have been done correctly and solemnly. To the extent that presumptions are usefully brought to bear where reasons are provided for decisions the subject of an application for an order of review under the ADJR Act, it may be that the relevant presumption is that embodied in the Latin expression *omnia praesumuntur legitime facta donec probetur in contrarium*. That presumption, which applies to official acts, is that all necessary conditions and formalities have been satisfied until the contrary is proved. See *Jowitt's Dictionary of English Law*, 2nd End. (1977), at p. 1283.

The ADJR Act does not make express provision as to the onus of proof in respect of grounds of review. In *Brunetto v. Collector of Customs* [1984] 4 FCR 92, at p. 97, it was said by Toohey J in relation to s. 5(1)(c) of that Act, that "it is incumbent on the applicant to demonstrate lack of jurisdiction". Given that there is nothing in the ADJR Act to displace the general rule that it is for an applicant to establish his or her case, the statement in *Brunetto* is undoubtedly correct, both as to the ground there under consideration and as to the other grounds of review provided by that Act. More particularly and bearing directly on the present cases, there is nothing in the ADJR Act to displace the common law rule that a person impeaching the exercise of a power on the basis of improper purpose bears the onus of establishing that issue. See, for example, as to the common law rule, *Municipal Council of Sydney v. Campbell* [1925] AC 338, at p. 343. And, where the subject matter of a decision falls squarely within the terms of a statutory provision, then, in the absence of evidence establishing improper purpose or evidence displacing all possible permitted purposes, it must be accepted, simply because of the absence of such evidence, that the decision was made for a purpose for which such decisions might properly be made. It is only if the purpose attending the decision must be ascertained by inference from other facts that a presumption of regularity has a role to play. An improper purpose will not lightly be inferred and by application of a presumption of regularity, will only be inferred if the evidence cannot be reconciled with the proper exercise of the power. See *Reg. v. Inland Revenue Commissioners; Ex parte Rossminster* [1980] 952, per Lord Diplock at p. 1103.

In the present cases there is no need to draw any inference as to the purpose attending the decision to exercise the right of access and to require the production of documents. The reasons given pursuant to s. 13 of the ADJR Act make it clear that those decisions were taken for the purpose of carrying out the audit of the affairs of IEL and its associated entities. And the evidence makes it clear that audit was conducted only by reason of the policy decision to audit the affairs of "top one hundred". In the absence of some material bearing on, or some explanation based on, the taxation affairs of those companies or some reasonably significant number of them, that policy decision must be seen as one attended only with the purpose of enquiry with a view to implementing some purpose of the Act if some matter relevant to such purpose should be discovered. As that purpose must necessarily be attributed to the decisions to exercise the right of access and to require the production of documents, the appellants discharged the onus of establishing that those decisions were made for a purpose other than a purpose for which that right and that power were conferred.

The appeals should be allowed. In the first appeal the order of the Full Court should be set aside, the appeal to that Court should be allowed with costs, the order of Einfeld J set aside and, in lieu thereof, it should be ordered that the decision to exercise the right of access by entering the premises of Bankers Trust Australia Limited be set aside with costs. In the second appeal the order of the Full Court should be set aside and, in lieu thereof, it should be ordered that the decision to require the production of documents be set aside with costs. As no material or argument was advanced to suggest the insufficiency of orders setting aside the decisions, the claim for additional relief by way of injunction should be refused in both cases.

Also found at [1991] 3 CLJ 2373